

1 GEORGE JEPSEN
2 ATTORNEY GENERAL OF CONNECTICUT
3 Assistant Attorney General Gary M. Becker
4 55 Elm Street
5 Hartford, CT 06106
6 Tel: 860-808-5040
7 Fax: 860-808-5391
8 gary.becker@ct.gov

9 and other State Attorneys General noted on
10 signature pages.

11
12 IN THE UNITED STATES DISTRICT COURT
13
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA
15
16 SAN FRANCISCO DIVISION
17

18 IN RE: CATHODE RAY TUBE (CRT)
19 ANTITRUST LITIGATION,

20 This Documents Relates To:
21
22 ALL ACTIONS

Master File No. 3:07-cv-05944-JST

MDL No. 1917

**STATEMENT OF INTEREST OF THE
STATES OF CONNECTICUT,
ALABAMA, ARKANSAS, COLORADO,
DELAWARE, GEORGIA, KENTUCKY,
LOUISIANA, MARYLAND, OHIO,
OKLAHOMA, PENNSYLVANIA, and
VIRGINIA**

Hearing Date: March 15, 2015
Time: 2 P.M.
Courtroom: Courtroom 9, 19th Floor
Judge: Honorable Jon S. Tigar
Special Master: Martin Quinn, JAMS

23
24
25
26
27
28
STATEMENT OF INTEREST OF THE STATES OF CONNECTICUT, ALABAMA, ARKANSAS, COLORADO,
DELAWARE, GEORGIA, KENTUCKY, LOUISIANA, MARYLAND, OHIO, OKLAHOMA, PENNSYLVANIA,
and VIRGINIA

(Master File No. CV-07-5944-JST)

TABLE OF AUTHORITIES

<u>Cases</u>	Page
<i>Illinois Brick v. Illinois</i> 431 U.S. 720 (1977).....	1
<i>In re Cellular 101, Inc.</i> 539 F.3d 1150 (9th Cir. 2008).....	2
<i>In re Auction Houses Antitrust Litig.</i> 42 F. App'x 511 (2d Cir. 2002).....	4
<i>In re Auction Houses Antitrust Litig.</i> No. 00 CIV. 0648 (LAK), 2001 WL 170792 (S.D.N.Y. Feb. 22, 2001).....	3
<i>Jeff D. v. Andrus</i> 899 F.2d 753 (9th Cir. 1989).....	2
<i>McCluskey v. Rob San Servs., Inc.</i> 443 F. Supp. 65 (S.D. Ohio 1977).....	2
<i>Parish. v. Maryland & Virginia Milk Producers Ass'n</i> 250 Md. 24, 101 (Md. 1968).....	2
<i>Viera v. Cohen</i> 283 Conn. 412 (Conn. 2007).....	2
<u>Statutes</u>	
28 U.S.C. § 1715(b).....	1
28 U.S.C. § 1715(f).....	1
<u>Rules</u>	
Fed. R. Civ. P. 12(b)(6).....	2
<u>Legislative History</u>	
S. REP. 109-14, 14-20, 28, 32-33, 35, 2005 U.S.C.C.A.N. 3, 17-21, 28, 31-32, 34.....	1

1 The Attorneys General of the States of Connecticut, Alabama, Arkansas, Colorado,
 2 Delaware, Georgia, Kentucky, Louisiana, Maryland, Ohio, Oklahoma, Pennsylvania, and Virginia
 3 (the "Non-Repealer States") file this statement of interest under the Class Action Fairness Act
 4 ("CAFA"). CAFA grants the state attorneys general the power to offer their perspective on final
 5 approval of class settlements. 28 U.S.C. § 1715(b). As Congress has explained, the primary
 6 purpose of "requiring that notice of class action settlements be sent to appropriate state and
 7 federal officials [is] so that they may voice concerns if they believe that the class action is not in
 8 the best interest of their citizens." S. REP. 109-14, 5, 2005 U.S.C.C.A.N. 3, 6. "[N]otifying the
 9 appropriate state and federal officials of proposed class action settlements will provide a check
 10 against inequitable settlements in these cases" and "will also deter collusion between class
 11 counsel and defendants to craft settlements that do not benefit the injured parties." *See* S. REP.
 12 109-14, 14-20, 28, 32-33, 35, 2005 U.S.C.C.A.N. 3, 17-21, 28, 31-32, 34.

13 CAFA does not set up a timetable for such a statement to be filed before final approval, let
 14 alone hinge the filing of such a statement on the deadline for filing objections. *See* 28 U.S.C.
 15 §1715(b). The need for the state attorneys general to be heard in this Court only crystalized with
 16 the filing of the Report and Recommendation in this case on the final approval of the Indirect
 17 Purchaser Plaintiff settlements.¹ Accordingly, the Non-Repealer States now respectfully submit
 18 this Statement of Interest to assist this Court in evaluating the proposed settlements, and
 19 allocation of settlement proceeds, of the Indirect Purchaser Plaintiffs.

20 The settlement proposed here assigns zero distribution to residents of states that have not
 21 passed statutes or that do not have dispositive case law repealing the bar, instituted by the U.S.
 22 Supreme Court in *Illinois Brick v. Illinois*, 431 U.S. 720, 729-35 (1977), on recovery of antitrust
 23 damages by indirect purchasers. At the same time, the proposed settlement compels a release of
 24 these purported zero value claims, whether they be claims for damages or for equitable relief.
 25 The Non-Repealer States filing this statement believe that such result is both unfounded and

26 ¹ CAFA expressly provides that the states need not weigh in on any given settlement. *See*
 27 28 U.S.C. § 1715(f). Accordingly, it misplaces the role of CAFA to interpret the lack of any
 28 initial feedback from state attorneys general on these settlements as a factor supporting final
 approval.

1 unfair. It is at best an open question as to whether residents in Non-Repealer States may obtain
 2 monies by way of the equitable remedies of disgorgement and restitution. The Special Master
 3 apparently believes that they may not, but the law is far from settled on that point, as the
 4 objection filed by Cooper & Kirkham, P.C. on February 26, 2016 (Doc. # 4437) amply
 5 demonstrates.

6 What is settled, however, is the fact that a release in a settlement is a contract between the
 7 parties, construed and enforced as would be any other contract. *See, e.g., Jeff D. v. Andrus*, 899
 8 F.2d 753, 759 (9th Cir. 1989)("An agreement to settle a legal dispute is a contract and its
 9 enforceability is governed by familiar principles of contract law"); *McCluskey v. Rob San Servs.,*
 10 *Inc.*, 443 F. Supp. 65, 68 (S.D. Ohio 1977)("Generally, a release is a contract, the validity of
 11 which is to be determined by reference to the principles of contract law"); *Parish. v. Maryland &*
 12 *Virginia Milk Producers Ass'n*, 250 Md. 24, 101 (Md. 1968)("A release, however, is a contract
 13 and may be set aside for the same reasons for which any other contract may be avoided"). In
 14 order for a release to be valid, there must be consideration. *See Viera v. Cohen*, 283 Conn. 412,
 15 428 (Conn. 2007)("A release acts like a contract and, as with any contract, requires consideration,
 16 voluntariness and contractual capacity"). Without any distribution flowing to the residents of
 17 Non-Repealer States, there is no consideration to support the release of claims flowing in the
 18 other direction. Simply put, if the defendants want a release from residents of Non-Repealer
 19 States, then the release of those claims necessarily must have some value to them. If so, they
 20 should pay for that release.

21 Alternatively, if the claims of Non-Repealer State residents truly have no value, then the
 22 question naturally arises -- why is a release of a valueless claim required at all? Release is an
 23 affirmative defense; it is waived if not pleaded and is not subject to resolution short of a summary
 24 judgment. *See In re Cellular 101, Inc.*, 539 F.3d 1150, 1155 (9th Cir. 2008)("Settlement and
 25 release is an affirmative defense and is generally waived if not asserted in the answer to a
 26 complaint"). If the claims are truly barred by *Illinois Brick*, then that is the proper subject of a
 27 motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), which if granted will

1 terminate the case in favor of the defendants far sooner than would pleading and proving the
2 affirmative defense of release.

3 A situation analogous to the instant case was presented to the courts in *In re Auction*
4 *Houses Antitrust Litig.*, No. 00 CIV. 0648 (LAK), 2001 WL 170792 (S.D.N.Y. Feb. 22, 2001)
5 *aff'd*, 42 F. App'x 511 (2d Cir. 2002). In that case, a consolidated price-fixing case against
6 auction houses Sotheby's and Christie's, the class action settlement distributed the recovery to all
7 consumers who had bought or sold through the defendant auction houses only in the United States
8 during the class period. However, the settlement also released claims of consumers who had
9 bought and sold through the auction houses outside the United States, without giving any
10 distribution at all to those consumers. Some consumers, who had claims based on auctions both
11 in and out of the United States, objected to this release. The district court observed that it had
12 already dismissed claims under the Sherman Act by consumers who asserted that they had been
13 damaged by price fixing in foreign auctions and opined:

14
15 Nor is there any reason to suppose that Mixed Class Members would be permitted
16 to maintain suits based on foreign law to recover damages suffered in foreign
17 auctions in courts in this country, as any such claims almost certainly would be
18 dismissed on the basis of the forum selection clauses in the terms and conditions
employed by both Christie's and Sotheby's. Hence, Mixed Class Members would
not be required, as a condition of collecting settlement proceeds in this case, to
give up anything of great value.

19 *Id.* at *11. Nonetheless, the district court also noted:

20
21 Defendants, the Court is told, bargained hard for this release. ... Thus, there is at
22 least some indication that the settlement fund defendants propose to create for the
23 benefit of the class has been enhanced, even if only in a very small way, by
defendants' perception that they thereby would gain a benefit at the expense of
those with foreign auction claims.

24 *Id.* at *13. The district court concluded that "there is no reason why some class members should
25 be forced to give up something of value to enable other class members to benefit from a
26 settlement made richer at their expense," and that "an expanded release requires the allocation of
27 at least some of the settlement consideration to the holders of the claims prejudiced by the

1 expansion" *Id.* at *12-13. For that reason, the district court rejected the settlement.

2 In affirming the district court, the Second Circuit observed "[t]hat the impairment may be
3 slight is of no moment, as we cannot say that it is valueless (indeed, it obviously has value to the
4 Auction Houses that argue so strenuously for approval of it), yet it is exacted without any
5 compensation whatsoever." *In re Auction Houses Antitrust Litig.*, 42 F. App'x 511, 519 (2d Cir.
6 2002). Moreover, this is not an issue that notice can cure. *Id.* ("[A]n unfair settlement should not
7 be approved even if both notice and representation were adequate").

8 The Non-Repealer States believe that the defendants cannot both eat their cake and have it
9 too. Either the claims have value or they do not. If they do have value, then defendants should
10 pay for their release. If the claims have no value, then there is no need for a release. The Non-
11 Repealer States submit that the simplest course of action is for the Court to require removal of the
12 release imposed on the residents of Non-Repealer States who are receiving no distribution.
13 Except as stated herein, the Non-Repealer States take no position on any other aspect of the
14 proposed settlement. The Non-Repealer States, by submitting this CAFA Statement of Interest,
15 do not intend to appear in or become parties to this case.

1 Dated: March 8, 2016

Respectfully submitted,

2
3 GEORGE JEPSEN
ATTORNEY GENERAL OF
CONNECTICUT

4 /s/ Gary M. Becker
5 By: Gary M. Becker
Assistant Attorney General
6 55 Elm Street
Hartford, CT 06106
7 Tel: 860-808-5040
Fax: 860-808-5391
8 gary.becker@ct.gov

9
10 JEFF LANDRY
ATTORNEY GENERAL
STATE OF LOUISIANA

11 By: Stacie L. Deblieux
12 Assistant Attorney General
Public Protection Division
13 1885 North Third St.
Baton Rouge, LA 70802
14 Tel: (225) 326-6400
Fax: (225) 326-6499
15 Email: deblieuxs@ag.state.la.us

16
17 JOHN E. FROSH
MARYLAND ATTORNEY GENERAL

18 By: John Tennis
Assistant Attorney General
19 Deputy Chief, Antitrust Division
200 St. Paul Place
20 Baltimore, MD 21202
410-576-6470
21 jtennis@oag.state.md.us

22
23 MICHAEL DeWINE
ATTORNEY GENERAL OF OHIO

24 By: Matthew K. McKinley
Assistant Attorney General
25 Antitrust Section
150 East Gay Street, 22nd Floor
26 Columbus, Ohio 43214
(614) 995-1090
27 Matthew.Mckinley@OhioAttorneyGeneral.gov

1 Dated: March 8, 2016

2
3 SAMUEL S. OLENS
ATTORNEY GENERAL OF GEORGIA

4 By: Monica Sullivan
Assistant Attorney General
5 40 Capitol Square, SW
Atlanta, Georgia 30334-1300
6 (404) 651-7675
(404) 656-0677
7 msullivan@law.ga.gov

8
9 MATTHEW P. DENN
ATTORNEY GENERAL OF DELAWARE

10 By: Michael A. Undorf
Deputy Attorney General
11 820 N. French St., 5th Floor
Wilmington, DE 19801
12 (302) 577-8924
13 Michael.Undorf@state.de.us

14 ANDY BESHEAR
ATTORNEY GENERAL OF KENTUCKY

15 By: Charles W. Rowland
Assistant Attorney General
16 Office of Consumer Protection
1024 Capital Center Dr. Ste. 200
17 Frankfort, KY 40601
18 (859)696-5300
19 Charlie.Rowland@ky.gov

20 MARK R. HERRING
ATTORNEY GENERAL OF VIRGINIA

21 By: Tyler T. Henry
Assistant Attorney General
22 900 East Main Street
23 Richmond, Virginia 23219
24 804-692-0485
therry@oag.state.va.us

1 Dated: March 8, 2016

2
3 KATHLEEN G. KANE
4 ATTORNEY GENERAL OF
5 PENNSYLVANIA

6 By: Tracy W. Wertz
7 Chief Deputy Attorney General
8 Antitrust Section
9 Pennsylvania Office of Attorney General
10 14th Floor Strawberry Square
11 Harrisburg, PA 17102-1410
12 (717) 787-4530
13 twertz@attorneygeneral.gov

14
15 LESLIE RUTLEDGE
16 ARKANSAS ATTORNEY GENERAL

17 By: John Alexander
18 Assistant Attorney General
19 323 Center Street, Suite 200
20 Little Rock, Arkansas 72201
21 Office: 501.682.8063 | Cell: 501.517.4032
22 john.alexander@arkansasag.gov

23
24 SCOTT PRUITT
25 OKLAHOMA ATTORNEY GENERAL

26 By: Rachel A. Irwin
27 Assistant Attorney General
28 313 N.E. 21st Street
Oklahoma City, Oklahoma 73105
Telephone: (405) 522-1014
Facsimile: (405) 552-0085
Rachel.Irwin@oag.ok.gov

LUTHER STRANGE
ATTORNEY GENERAL OF ALABAMA

By: Billington M. Garrett
Assistant Attorney General
501 Washington Avenue
Montgomery, AL 3610
334-242-7300
bgarrett@ago.state.al.us

1 Dated: March 8, 2016

3 CYNTHIA H. COFFMAN
4 ATTORNEY GENERAL OF COLORADO

5 By: Jennifer H. Hunt
6 First Assistant Attorney General
7 Ralph L. Carr Colorado Judicial Center
8 1300 Broadway
9 Denver, Colorado 80203
10 Telephone: 720-508-6215
11 jennifer.hunt@coag.gov

12 Pursuant to Civil L.R. 5-1(i), the filer attests that concurrence in the filing of this
13 document has been obtained from each of the above signatories.